

No. 10-19-00252-CR

**IN THE COURT OF APPEALS
FOR THE TENTH DISTRICT OF TEXAS
AT WACO**

FILED IN
10th COURT OF APPEALS
WACO, TEXAS
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NITA WHITENER
Clerk

**ROBERTO ESCOBAR HERNANDEZ,
Appellant**

v.

**THE STATE OF TEXAS,
Appellee**

*On appeal from the County Court at Law
of Navarro County, Texas
In Cause No. D38732-CR*

BRIEF FOR APPELLANT

ORAL ARGUMENT NOT REQUESTED

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LIST OF PARTIES

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TO THE HONORABLE COURT OF APPEALS:

COMES NOW Appellant, Roberto Escobar Hernandez, and submits this brief on appeal from a conviction in the 13th Judicial District Court at Law of Navarro County, Texas, the Honorable James Lagomarsino, Judge Presiding.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Tex. R. App. P. 39.1 and 39.2, Appellant does not request oral argument before this Court of Appeals. See Tex. R. App. P. 39.1 & 39.2. Although this is a meritorious appeal of a criminal case, Appellant believes that the facts and legal arguments are adequately presented in this brief and in the record on appeal. Appellant also believes that the decisional process of the Court of Appeals will not be significantly aided by oral argument. As a result, Appellant does not request oral argument and asks that the issues presented in this brief be considered by this Court of Appeals by submission only.

STATEMENT OF THE CASE

Appellant was charged by indictment with aggravated sexual assault of a child, in violation of Tex. Penal Code § 22.021(A)(2)(B). (CR: P19). Appellant entered a plea of not guilty to the charge as alleged (RR: V1, P19). Appellant elected

to testify on his own behalf. (RR: V4, P7). The complaining witness testified that her father, Appellant, inserted his penis into her mouth (RR: V3, P108-109). During his testimony, Appellant conceded that he did touch the complaining witness inappropriately with the intent to arouse his sexual desire. (RR: V4,P18-19). Appellant further testified that he then pulled his pants down and pulled the complaining witness in close to him. (RR: V4,P21). Appellant also testified that he never inserted his penis into the mouth of the complaining witness (RR: V4,P21).

ISSUE PRESENTED

The trial court erred in denying Appellant's request for an instruction in the charge to the jury on the offense of indecency with a child by contact as a lesser included of the charge as indicted.

STATEMENT OF FACTS

Appellant was charged by indictment with aggravated sexual assault of a child, in violation of Tex. Penal Code § 22.021(A)(2)(B). (CR: P19). Appellant entered a plea of not guilty to the charge as alleged (RR: V1, P19). Appellant elected to testify on his own behalf. (RR: V4, P7). The complaining witness testified that her father, Appellant, inserted his penis into her mouth (RR: V3, P108-109). During his testimony, Appellant conceded that he did touch the complaining witness

inappropriately with the intent to arouse his sexual desire. (RR: V4,P18-19). Appellant further testified that he then pulled his pants down and pulled the complaining witness in close to him. (RR: V4,P21). Appellant also testified that he never inserted his penis into the mouth of the complaining witness (RR: V4,P21).

Appellant put forth a plausible explanation for why it was that the complaining witness may have been confused about what had actually transpired, which was that her brother had engaged in similar conduct with her shortly before this event took place. (RR: V3,P47-49).

At the close of testimony, the charge conference was held. (RR: V4,P106). The original charge as proposed by the court included indecency with a child as a lesser included of aggravated sexual assault of a child, to which the State objected (RR: V4,P106). The court ultimately denied Defense counsel's request for the lesser included to be included in the charge and the original version of the charge, including the lesser, was introduced into the record for preservation of the issue. (RR: V5,P9-10).

SUMMARY OF ARGUMENT

The trial court erred when it failed to instruct the jury of their ability to find Appellant guilty of the lesser included offense of indecency with a child by contact, as opposed to aggravated sexual assault of a child as originally indicted.

ARGUMENT

Evidence was presented in trial that the Appellant had engaged in inappropriate behavior with the complaining witness. However, precisely what inappropriate behavior he engaged in was controverted by the testimony of the only two witnesses who were present at the time. By complaining witnesses' testimony, Appellant committed the offense of aggravated sexual assault of a child. However, by Appellant's testimony, the facts would have supported a finding of guilt for the lesser included offense of indecency with a child by contact. Appellant further put forth a plausible explanation for why the complaining witness may have been confused about the occurrence, which was that she had been subjected to a similar experience with her older brother shortly before this event took place.

Article 37.09 of the Texas Code of Criminal Procedure governs what constitutes a lesser included offense and provides that an offense is a lesser included offense if:

- (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
- (2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission;

- (3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or
- (4) it consists of an attempt to commit the offense charged or an otherwise included offense.

The Court of Criminal Appeals has already had before it the issue of whether or not indecency with a child by contact is a lesser included offense of aggravated sexual assault of a child, and has held that it is a lesser included offense, when the conduct arises out of the same act. *Evans v. State*, 299 SW 3d 138 at 143 (Tex.Crim.App. 2009). In the case at bar, only one act was put into issue, which is what took place within a matter of a brief couple of minutes, on the day in question, in the place referred to in trial as “the container”.

The court in *Ochoa* reviewed what constituted an “act”. In that case, the indictment referenced five different dates that assaults were alleged to have taken place and anything that occurred during a particular date of offense was considered to have taken place as part of “the same transaction”. *Ochoa v. State*, 982 SW 2d 904 (Tex.Crim.App. 1998). It was further explained that since each date constituted a single transaction, Appellant could not be convicted of both the greater and lesser offenses, concluding that indecency with a child is a lesser included offense of aggravated sexual assault of a child. *Id* at 908.

Once determining that an offense is a lesser included, the second step in the analysis of whether that issue should be brought to the jury is whether or not there is some evidence before the jury that would support a finding of the lesser included offense. *Guzman v. State*, 188 S.W.3d 185, 188-89 (Tex.Crim.App. 2006); *Hall*, 225 S.W.3d at 536 (Tex.Crim.App. 2007). Clearly that is the case here, as the Appellant testified as such in trial.

Further, the evidence should establish the lesser included offense as “a valid, rational alternative to the charged offense.” *Hall*, 225 S.W.3d at 536; see *Segundo v. State*, 270 S.W.3d 79, 90-91 (Tex.Crim.App. 2008). That was also done in the case at bar, as the testimony in trial was that the shortly before this incident, the complaining witnesses’ brother had assaulted her in the way she accused Appellant of.

Because both prongs of the test for a lesser included offense instruction have been met in the case at bar, Appellant was entitled to an instruction on the lesser included offense, and the court erred in denying his request when timely made at trial.

PRAYER

WHEREFORE, PREMESIS CONSIDERED, Appellant prays that this Court sustain Appellant’s Point of Error, overturn her conviction, and remand this case for

a new trial, and for such other and further relief to which Appellant may be entitled.

Respectfully submitted,

/s/ Shana Stein Faulhaber

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing brief was served on the Navarro County District Attorney's Office, 300 W 3rd Avenue, Corsicana, TX 75110, by electronic transmission on December 14, 2019.

/s/ Shana Stein Faulhaber

Shana Stein Faulhaber

CERTIFICATE OF COMPLIANCE

I hereby certify that the word count in this document, which is prepared in Microsoft Word 2016, is 1,646.